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No. 252

In the Supreme Court of the United States

OCTOBER TERM, 1931

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

v.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. ——

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE for the District of Georgia, petitioner

v.

THE STANDARD NUT MARGARINE COMPANY OF Florida

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the case between the above-named parties on April 22, 1931. (R. 51–52.)

OPINIONS BELOW

The opinion of the District Court for the Northern District of Georgia (R. 36–40) was filed June 2, 1930, and has not been reported. The opinion of the Circuit Court of Appeals (R. 50–51) is reported in 49 F. (2d) 85.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 22, 1931. (R. 51–52.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where the Commissioner of Internal Revenue has determined that a tax is imposed upon a certain product as oleomargarine, under the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), may a suit in equity for the sole purpose of restraining collection be maintained on the ground that no tax is imposed under a proper construction of the law, despite the prohibition of Section 3224 of the Revised Statutes?

2. Did the court below err in finding that the product of the respondent was not oleomargarine within the meaning of the Act of August 2, 1886?

STATUTES INVOLVED

Section 3224 of the Revised Statutes (U. S. C., Title 26, Sec. 154) provides:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

Section 267 of the Judicial Code, c. 231, 36 Stat. 1087, 1163 (U. S. C., Title 28, Sec. 384) provides:

> Suits in equity shall not be sustained in any court of the United States in any case

where a plain, adequate, and complete remedy may be had at law.

The Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), provides in part:

> SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine," namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil amotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter.

STATEMENT

The respondent taxpayer is a Florida corporation engaged in the manufacture and sale of a product known as "Southern Nut Product," a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter. (R. 1, 2.) Prior to the commencement of this action and on or about April 15, 1930, the Commissioner of Internal Revenue held that the said compound was taxable as artificially colored oleomargarine,

whereupon the petitioner proceeded to collect taxes and license fees as provided by the oleomargarine law (Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541)). (R. 13, 26.) This action was brought to restrain collection of any further tax on the "Southern Nut Product."

The bill of complaint (R. 14) alleges that "Southern Nut Product" is not oleomargarine as that term is defined in Section 2 of the Oleomargarine Act, *supra,* and that its taxation is therefore not justified or authorized by said Act. Petitioner's answer to the bill of complaint alleged that "Southern Nut Product" was artificially colored oleomargarine and was taxable. (R. 28.)

A preliminary injunction was denied by the District Court of the United States for the Northern District of Georgia (R. 36), and petitioner's motion to dismiss the bill was granted. (R. 41.) The respondent appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which reversed the District Court.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that an injunction should have been granted notwithstanding the prohibition of Section 3224 of the Revised Statutes.

2. The Circuit Court of Appeals erred in holding that the product of the respondent was not taxable as oleomargarine under the Act of August 2, 1886, c. 840, 24 Stat. 209.

REASONS FOR GRANTING THE WRIT

This case presents the same questions as those involved in No. ——, *Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Petitioner,* v. *The Standard Nut Margarine Company of Florida, a Corporation,* in which a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is filed simultaneously herewith. The same reasons for granting the writ apply to this case, and petitioner's brief in support of the petition in the *Miller case* is applicable to both cases. For the reasons urged in the *Miller case,* it is respectfully submitted that a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted in this case.

THOMAS D. THACHER,
Solicitor General.

JULY, 1931.

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